

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
PETITION FOR
REHEARING
EN BANC**

ORIGINAL

77-2057

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-2057

DAVID HOLLIS,

Petitioner-Appellant,

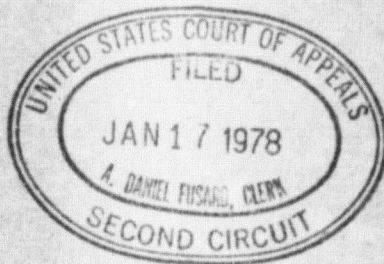
-against-

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

PETITION FOR REHEARING OR
REHEARING EN BANC



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Preliminary Statement

This is a motion for reconsideration of this Court's decision of January 3, 1978 which reversed a decision of the District Court (Platt, J.) and granted petitioner-appellant unconditional habeas corpus relief. Although this Court correctly rejected each of petitioner's due process claims, it inexplicably disregarded this Circuit's consistent refusal to pass on the

sufficiency of the evidence in habeas corpus proceedings, and granted relief on the grounds that the evidence adduced at the post-sentencing hearing failed to meet the "clear, unequivocal and convincing" standard applicable to such proceedings.

Statement of Facts

The facts are largely as stated in the opinion of this Court and will not be repeated herein. However, two points require clarification. The panel incorrectly computed the number of years petitioner served by including in the twelve year span the period of time he was on parole and the additional sentence he served (1 1/2 to 3 years) for a crime he committed while on parole. Consequently, this Court's conclusion that petitioner served twelve years for the original offense is inaccurate.

This Court also incorrectly notes (slip op. at 844) that "the psychiatric report was not offered at the hearing and there is nothing to indicate that the judge gave any weight to it." However, the report was addressed to the judge (A-142); the petitioner devoted the first point in his brief to the Appellate Division to an attack upon the adequacy of this report; and the Appellate Division, in affirming the sentence, found that the psychiatric report was part of the record

developed at the hearing (slip op. at 845).

ARGUMENT

THE COURT EXCEEDED THE SCOPE OF REVIEW APPROPRIATE IN HABEAS CORPUS PROCEEDINGS BY GRANTING RELIEF ON THE GROUNDS THAT THE EVIDENCE ADDUCED AT THE HEARING WAS NOT CLEAR, CONVINCING AND UNEQUIVOCAL.

By concluding that the evidence adduced at the hearing did not satisfy the "clear convincing and unequivocal" standard applicable to such post-conviction proceedings, this panel improperly substituted its own view of the evidence for that of the state trial and appellate courts. It is axiomatic that a federal habeas corpus court may not sit as an appellate court to review the sufficiency of the evidence in support of a conviction unless the conviction is so totally devoid of evidentiary support as to be a violation of due process. Vachon v. New Hampshire, 404 U.S. 478 (1974); Gregory v. City of Chicago, 394 U.S. 111, 112 (1969); Garner v. Louisiana, 368 U.S. 157, 166 (1961); Terry v. Henderson, 462 F. 2d 1125, 1131 (2nd Cir., 1972); United States ex rel. Griffin v. Martin, 409 F. 2d 1300, 1302 (2nd Cir., 1969); United States ex rel. Mintzer v. Dross, 403 F. 2d 42 (2nd Cir., 1967), cert. den. 390 U.S. 1044. While the instant case involves a post-sentencing procedure rather

than a trial, the same principle of law applies. Thus, while Judge Kelly, who presided at the post-conviction hearing, was bound to sentence the petitioner to a term of from one day to life based upon clear, unequivocal and convincing evidence that Hollis was a danger to society or was capable of being benefited by confinement, this Court may set aside that sentence only if the record contains no evidence to support either finding. Such is not the case herein. Although the panel, apparently sympathetic to petitioner's plight, minimized the evidentiary support for Judge Kelly's order, the evidence in the record is much more substantial than the panel suggests.

The petitioner, who was indicted by a grand jury for the crimes of attempted rape in the first degree, assault with attempt to rape and assault with a weapon (a knife), pleaded guilty to the second count of the three count indictment, i.e. assault with intent to commit rape. Petitioner had a prior conviction for sexual abuse of a child as well as a history of bail jumping (A-34). At the hearing petitioner testified that between 1948 and 1966 he had been imprisoned six or seven times (A-132). While under supervision of the Department of Correction in Clinton Correctional Facility, petitioner received psychiatric treatment (A-122), published a magazine article (A-125) and completed two mail order courses in religious subjects (A-123-124).

The trial court found that petitioner's history, as well as the testimony of the two psychiatrists that petitioner had a personality disorder of a paranoid nature (A-84) with insufficient impulse control, and would benefit from chemotherapy in a closed setting (A-66), supported a finding that the petitioner presented a danger to society and might benefit from treatment in a controlled environment. The Appellate Division, in affirming this decision, 34 A D 2d 786 (1969), found that:

"... the record developed at the hearing, including the psychiatric report, provided a sufficient basis upon which the court could exercise its discretion. It is our view that the sentence imposed was proper in the light of that record."

As it is beyond dispute that the State courts carefully considered the record and found it sufficient to support the sentence, this Court is precluded from yet a further review of the evidence. Garner v. Louisiana, supra.

The impact of this Court's retreat from its consistent policy of refusing to weigh the sufficiency of the evidence upon habeas corpus review will not be limited to this case alone. Sixteen other inmates who have received sentences of from one year to life remain in the custody of the New York

State Department of Correctional Services, and thirty-two others who had received such sentences are currently under parole supervision. (Br. of petitioner-appellant, Appendix A). Every one of these prisoners and parolees may now effectively petition this Court for a review of the evidence adduced at his sentencing hearing. See Allen v. County Court, ___ F. 2d ___ (2nd Cir., November 29, 1977) slip. op. p. 563, f.n. 21.

Assuming, arguendo, that this Court did not commit an error of law by exceeding the appropriate scope of review, it should have not granted petitioner unconditional release. The Court concedes that the petitioner committed two criminal sexual acts, as well as yet another crime while on parole. At the very least, respondent is entitled to examine petitioner in order to determine whether he continues to present a danger to society, or requires additional treatment under parole supervision.

CONCLUSION

RESPONDENT'S MOTION FOR RECONSIDERATION
SHOULD BE GRANTED, AND UPON RECONSIDER-
ATION, THE PETITION FOR HABEAS CORPUS
RELIEF SHOULD BE DENIED.

Dated: New York, New York
January 17, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ
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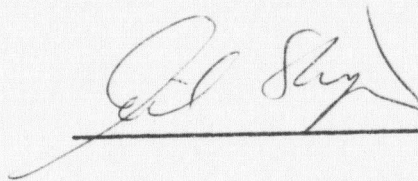
EILEEN SHAPIRO
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

Eileen Shapiro , being duly sworn, deposes and
says that she is an *Assistant* in the office of the Attorney
General of the State of New York, attorney for *Respondent-Appellants*
herein. On the 17 day of *January*, 1978, she
served the annexed upon the following named person :

James J. McDonough, Esq
Legal Aid Socy - Nassau County
33 Willis Avenue
Mineola, N.Y. 11501

Attorney in the within entitled *Proceeding* by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by
the Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by *him* for that purpose.



Sworn to before me this
17th day of *January*, 1978

Patricia C. Armstrong
Assistant Attorney General
of the State of New York